Supreme Court, U.S.
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No. 99 863

IN THE
SUPREME COURT OF THE UNITED STATES

DON PRINCE,

Petitioner.

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE COURT OF APPEALS ERR IN AFFIRMING THE DISTRICT COURT'S INSTRUCTION TO THE JURY THAT IN ORDER TO FIND ONE DEFENDANT GUILTY THEY WERE ALSO REQUIRED TO FIND THE OTHER DEFENDANT GUILTY?

II. DID THE COURT OF APPEALS ERR IN FINDING THAT THE DISTRICT COURT'S ADMISSION OF EVIDENCE THAT DON PRINCE AIDED A FUGITIVE WAS HARMLESS ERROR?

III. DID THE COURT OF APPEALS ERR IN FINDING THAT THE IMPROPER ADMISSION OF A RACIAL EPITHET WAS CURED BY INSTRUCTION?

IV. DID THE COURT OF APPEALS ERR IN REFUSING TO FIND THAT THE DISTRICT COURT'S ADMISSION OF AN OUT OF COURT STATEMENT MADE BY BILL PRINCE REQUIRED SEVERANCE BECAUSE BILL'S STATEMENT INCRIMINATED DON PRINCE?

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OPINIONS BELOW

Petitioner was convicted in the United States District Court for the District of South Carolina, at Columbia, CR-97-4329. The Fourth Circuit Court of Appeals affirmed the conviction in an unpublished per curiam opinion decided July 20, 1999. Petitioner filed a timely Petition for Rehearing which was denied on August 17, 1999.

JURISDICTION

Jurisdiction of the Supreme Court is invoked pursuant to Title 28, United States Code, §1254. The decision of the Fourth Circuit took effect on August 17, 1999.

STATUTES INVOLVED

Federal Rule of Evidence 403: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Federal Rule of Evidence 404(B): "Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial."

STATEMENT OF THE CASE

Petitioner, Don Prince, along with his brother, Bill Prince, was indicted for conspiring in a murder-for-hire scheme directed at

killing two persons expected to testify against Bill in connection with an earlier criminal prosecution. Don and Bill Prince proceeded to trial before the Honorable Joseph F. Anderson and a jury on July 9, 1996, through July 16,1996. Both brothers were convicted.

Don Prince was 55 years old at the time of trial. Don went to Cambell College on athletic scholarships in both baseball and basketball. (App. 595). After two years at Cambell College, Don went on to play baseball in the major leagues for the Chicago Cubs. He played professional baseball for seven years. During this time he also earned his degree from East Carolina University. Between baseball seasons, Don taught high school chemistry and physics and coached basketball. Also during this period, Don Prince got married and had two children. (App. 598).

After he left professional baseball, Don went into the insurance business and eventually started his own agency. He sold insurance and did estate planning. Don Prince also obtained his real estate licence and began selling and buying real estate. (App. 602). Don Prince made endowments to Duke University and Campbell College.

During this period, Bill Prince was a farmer. Don and Bill and their families remained close. Don testified that he and Bill have always been close and that he loves his brother. (App. 603). In 1992, Bill Prince was convicted in state court of conspiracy and solicitation of murder. Peaches Andrews was a key witness against Bill Prince on the issue of solicitation.

Bill Prince appealed his state convictions and was released on appeal bond. In the spring of 1993, while Bill Prince was out on appeal bond, he was diagnosed with cancer. Given his condition, Bill Prince was told the he had two years to live. Shortly thereafter, the South Carolina Supreme Court's opinion affirming Bill Prince's conviction was released and Bill filed a petition for rehearing. The petition for rehearing was denied on August 26,1994. Bill was supposed to turn himself in the Monday after rehearing was denied. Instead, Bill Prince left town. He was a fugitive from justice for some eleven months.

A month after Bill Prince fled from the authorities, Don received a call telling him that Bill was in Puerto Rico and that he

was in very bad shape. As soon as Bill was able to travel, Don brought him back to the United States. Don testified that he tried to talk Bill into turning himself in and that Bill told him that he would do so. However, when the brothers landed in Miami, Bill told Don that he was not going to turn himself in. Instead, Bill went to South Florida. Don went back to his home in North Carolina. Thereafter, Don and Bill Prince maintained contact by phone. Don went to Florida to see his brother on one occasion for a couple of days. Don admitted that he helped his brother financially during this period. When Bill began to have heart problems, he came to North Carolina for treatment. As Bill's condition improved, Don continued to try to talk him into turning himself in. Bill was eventually arrested in August of 1995. Don Prince admitted that it was wrong to assist Bill while he was a fugitive; however, he testified that he did it because he loved his brother. (App. 635).

Even before the petition for rehearing in Bill's criminal case was denied, Don had started working with lawyers Mark Stokes and Keith Kornahrens on motions for a new trial and for post conviction relief. Don testified that the plan was to get a new trial for Bill. He testified that the strategy was to get sworn affidavits to Bill's innocence. Bill's business was paying for the investigation, but Don Prince was doing the legwork. Don testified that he regularly came to South Carolina in search of witnesses and affidavits, to meet with attorneys, and to meet with Bill. (App. 639-640).

Don and the attorneys were trying to secure affidavits from witnesses to use in a motion for a new trial or post-conviction relief for Bill. Don had obtained favorable depositions from a couple named Bingham and Charles McRay and he had obtained statements from some twenty other witnesses. (App. 668-675). In addition, Don was talking to T. Cross, a man from Hartsville, South Carolina, who told him that he could get Peaches Andrews to sign an affidavit recanting his prior testimony against Bill. Don had an affidavit prepared and gave it to T. Cross. Don Prince testified that he was very hopeful that Peaches Andrews would provide testimony which would result in a new trial. Don testified that he

maintained this hope that Andrews would cooperate right up until December 14, 1996, the day Don was arrested. (App. 671).

Petitioner presented the testimony of attorneys who confirmed that he and they were working throughout this period to try to obtain affidavits in support of a motion for a new trial. Paul Fata is a South Carolina attorney. Mr. Fata represented Bill Prince at the original trial at which Charlie Dorn Smith was Prince's co-defendant and Peaches Andrews was the State's key witness. (App. 477). Mr. Fata testified that after Bill was incarcerated, he started working with Don Prince on Bill's behalf. Mr. Fata met with Don Prince at 2:00 on December 14,1995, to discuss a pending motion. (App. 489-490).

Mark Stokes is an attorney from Charleston, South Carolina. Mr. Stokes represented Bill Prince in his State appeal. (App. 504). Mr. Stokes testified that Don Prince contacted him about assisting with further legal remedies. Mr. Stokes testified that he was focusing on filing an application for post conviction relief and a motion for a new trial based on after discovered evidence. Mr. Stokes testified that he and another attorney, Keith Kornahrens were looking into contacting potential witnesses to develop evidence for a new trial. Keith Kornahrens did most of the leg work in looking for witnesses and in developing affidavits from different people. Mr. Stokes testified that he met with Don Prince on several occasions and that Don called him regularly. (App. 507). Mr. Stokes testified that they had information that Peaches Andrews was going to provide an affidavit recanting his trial testimony and that Charlie Dorn Smith had given an affidavit indicating that Bill Prince was not involved in the conspiracy to murder. Mr. Stokes testified that these two witnesses were critical to Bill Prince's hopes for a new trial.

Keith Kornahrens testified that he was the attorney doing most of the leg work developing witness statements. He testified that his contact person was Don Prince. Mr. Kornahrens testified that he met with Don Prince many times. Mr. Kornahrens testified that Don Prince was actively pursuing legal remedies for helping his brother and that they discussed individuals whose testimony was necessary and how to go about securing that testimony. Mr.

Kornahrens testified that he and Don Prince continued to discuss pursuing an affidavit from Peaches Andrews right up until December 14,1995. (App. 536-544; 553-558).

In late summer, Bill had started telling Don that he had a friend that was going to be able to get the statements signed. That supposed "friend" was actually inmate informant, Scott Sherpinskas. (App. 675, 682). Don testified that he was "thrilled" to hear that someone else was going to get the statements signed because he had exhausted just about every avenue. (App. 688). Also at this time, a man named George called Don and told him that Bill wanted Don to call with a status report. (App. 683). Don eventually met George Young at the prison. George Young was an inmate and Bill introduced him as a friend. (App. 689).

Don Prince testified that from time to time Bill asked him to send money to people in the prison and others outside the prison. Don testified that on occasion when he was busy, Bill just talked to the secretary and had her send money. Don testified that Bill had him sending people money "very often." (App. 689-693). Don met Young on more than one occasion when Bill told him to give Young money. Don testified that he called George Young several times, however, Don denied that the subject of killing Smith or Andrews ever came up in these conversations. (App. 699).

On December 13,1995, Don received a call from Bill. Bill told Don that he wanted him to meet a man at a rest area and give the man some money for helping with the deal to get affidavits from Peaches Andrews and Charlie Dorn Smith. (App. 671). On December 14,1995, Don Prince drove to South Carolina. (App. 705). He was going to see Bill and he also had a meeting with attorney Fata at 2:00 that afternoon. At Bill's request, Don put $2,500 in one envelope and $2,500 in another. Don testified that he went to the prison where he and Bill discussed the fact that Peaches Andrews was supposedly missing. (App. 711). Nevertheless, Bill told him to go ahead and deliver the money to pay for Andrews' statement. Bill told Don that they would have to hold up on getting the statement from Charlie Dorn Smith because Don had not brought enough money. (App. 713). Bill told Don that the man at the rest stop was going to give him a package and

that the package contained drugs. Don told Bill that under no circumstances would he pick up drugs for him.

The afternoon of December 14,1996, Don drove to the rest area and met the man. Don testified that he was very uncomfortable dealing with the man who was dressed to look like a motorcycle gang member. (App. 715-716). The man was actually undercover agent Bruce Otterbacher. Don testified that the man was "scary." (App. 716). Don gave the man the money from Bill which Don believed would be used to obtain statements. Don testified that neither he nor the man discussed Peaches Andrews or the fact that he was supposedly missing. The man asked Don about Charlie Dorn Smith. Don testified that he thought that the man was talking about getting an affidavit from Smith. Don told the man that "Bill said, hold up." (App. 719).

The man (Agent Otterbacher) tried to sell Don $275 worth of heroin. Don refused to take the drugs, but the man tried to shove the drugs into Don's pocket. Don resisted and never accepted the drugs. (App. 720).

Don testified that if the man he met had said anything about violence or killing, that he would have turned around and left. Don testified that when the man at the rest stop talked about "deals" he assumed the man was talking about procuring witness statements. (App. 720-723). Don testified that if Bill had told him anything about the money being a payoff for murder, he would never have gone to deliver the money.

ARGUMENT

I. The court of appeals erred in affirming the district court's jury instruction that in order to find one defendant guilty they were also required to find the other defendant guilty.

After it had begun deliberations, the jury submitted a question which read:

> In relation to Counts One and Two
> regarding the alleged conspiracy,
> can we render a guilty verdict for one
> defendant and/or a not guilty verdict
> for the other defendant?

The district court judge answered this question, "No." He instructed the jury that a person cannot conspire with himself and that the essence of an agreement is a situation involving two people. The district court ruled that since there were only two defendants named in the indictment, if one was convicted, the jury was likewise required to convict the co-defendant. This ruling was error.

The United States Supreme Court held in United States v. Powell, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461(1984), that a defendant convicted by a jury on one count cannot attack the conviction because it was inconsistent with the verdict of acquittal on another count.

The Powell Court noted; "Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment." 105 S.Ct. at 475. The Powell Court cited the opinion in Dunn v. United States, 284 U.S. 390, 52 S.Ct. 189, 76 L. Ed. 356 (1932), as establishing "the unreviewable power of a jury to return a verdict of not guilty for impermissible reasons." 105 S.Ct. at 476. The Court recognized that out of deference to juries, "Courts have always resisted inquiring into a jury's thought processes." 105 S.Ct. at 478. The Court noted the possibility that inconsistencies may be the result of jury lenity and that Dunn has been explained by both courts and commentators as a recognition of the jury's historic function, in criminal trials, as a check against arbitrariness or the oppressive exercise of power. 105 S.Ct at 477.

The district court should not have interfered with the jury's ability to return the verdict which they believed did justice. The jury may have had a reasonable doubt as to Petitioner's involvement in the murder for hire plot. They may have decided that based on the facts and their instructions, Petitioner was not guilty. The jury may have theorized that Bill Prince conspired with some person

other than Don Prince, for example, George Young. If so, the jury could have concluded that Bill Prince was guilty while Don Prince was not. The jury may even have been attempting to be lenient

Petitioner cannot say with certainty what the jury's thought processes were and an inquiry into their thought processes is not necessary. The jury made it clear that they sought to acquit one of the Petitioners of conspiracy to commit murder even though they convicted his co-defendant. They asked if they could reach these verdicts and they should have been told that they could. Even if the district court judge believed that such verdicts would have been inconsistent, he should not have insisted on consistency from the jury. As argued by Counsel for Petitioner, any inconsistency could have been cured by motion after the verdict.

The trial judge erred in instructing the jury that in order to convict one of the co-defendants it had to convict the other. This instruction robbed Don Prince of his right to require the Government to prove him guilty beyond a reasonable doubt in order to obtain a conviction against him.

The court of appeals did not address this issue in its original per curiam opinion and again failed to address it on rehearing. This is reversible error.

II. The court of appeals erred in finding that the district court's admission of evidence that Don Prince aided a fugitive was harmless error.

Bill Prince was a fugitive for eleven months. The Government sought to present evidence that Don Prince aided his brother during the months that Bill was a fugitive. The district court admitted the evidence over defense objection.

Petitioner argued that the admission of this evidence violated Federal Rule of Evidence 404(b), in that it simply constituted evidence of bad character with no other legitimate evidentiary purpose, and Rule 403, in that its prejudicial effect outweighed its probative value.

The court of appeals held that the evidence of Don's assistance to Bill while he was a fugitive was inadmissible under

both Rule 403 and 404(b). The Fourth Circuit noted that the only probative value of this evidence was to suggest that "Don had previously been involved in Bill's unlawful activity and that he would therefore likely have conspired with his brother in the charged conspiracy." This is inadmissible propensity evidence. The court of appeals acknowledged that the evidence should have been excluded, noting, "It is difficult to see what probative value this evidence could have had other than to suggest that Don had previously been involved in Bill's unlawful activity, and that Don was therefore likely to have conspired with his brother in the charged conspiracy....Even if this evidence could survive scrutiny under Rule 404(b), it would nonetheless be inadmissible under Rule 403 because its prejudicial effect would outweigh whatever modest probative value it might have."

However, the court then found the error harmless in light of the "voluminous properly admitted evidence" presented against Don Prince. The court of appeals held that the error here did not affect the judgment and was therefore harmless. This finding was error.

First, the evidence of Don's assistance to Bill while Bill was a fugitive made up a large portion of the Government's case against Don. Further, although there was "voluminous" evidence of Bill's involvement, there was actually no direct and very little circumstantial evidence against Don. Under these circumstances, the court of appeals erred in finding that this evidence did not affect the judgement.

As noted by the court of appeals, this evidence served the Government by allowing them to show that Don had a history of going to extremes and of breaking the law in order to help his brother Bill. If this evidence had never been presented and Don had been presented to the jury with a clean slate, the Government would surely have had greater difficulty convincing the jury that Don Prince would break the law in order to help his brother. Clearly, the Government's road to convincing the jury that Don participated in the murder for hire conspiracy was paved by the evidence of his prior criminal assistance to his brother. The case against Don was undeniably a close one and the improper

propensity evidence undoubtedly had some effect on the judgement. The court of appeals erred in finding that it was highly probable that the admission of this evidence had no effect on the judgement.

III. The court of appeals erred in finding that the improper admission of a racial epithet was cured by instruction.

The Government sought to introduce a tape recording and transcript of a conversation between Bill Prince and Sherpinkskas. During the conversation, Bill Prince used the term "niggers." Defense counsel moved to exclude the portion of the tape on which Bill Prince used the racial epithet. The district court denied that motion and allowed the racial epithet to be presented to the jury.

The court of appeals rejected every excuse made by the Government for the admission of this evidence. The court of appeals opinion indicates that it was indeed error for the district court to refuse to redact Bill Prince's statement to omit the racial epithet. However, the court then finds that this error was harmless due to the fact that the judge instructed the jury not to allow the offensive language to influence its conclusions. The court of appeals found that the instruction was "sufficient to eliminate the relatively modest prejudicial effect that this isolated epithet might otherwise have had on the jury."

This holding was error. The language at issue here is arguably the single most offensive word in the English language. The prejudicial effect which stems from the use of this word is never "modest." Instead, the use of this word brands the speaker as a racist. The Government understood the devastating strength of this word. The Government argued that while the Prince brothers had been portrayed by the defense as upstanding citizens, the jury was entitled to know what kind of people they really were. The Government argued that the jury should hear Bill Prince's use of this racial epithet so that they would understand his true nature. The Government believed that allowing the jury to hear this one word would turn the jury against the Prince brothers. The Government was right. The use of this word is so powerfully offensive that it convinces the hearer, not just that the speaker uses

bad words, but instead that the speaker is a bad person.

The judge mildly instructed the jury not to be prejudiced because the speaker used language which "might" be offensive to them. The judge's instruction could have been sufficient if the language in question had consisted merely of swear words. However, the instruction was not sufficient to "eliminate" the prejudicial effect which naturally results from the use of this word.

The court of appeals erred in finding that the district court's instruction cured the error.

IV. The court of appeals erred in refusing to find that the district court's admission of an out of court statement made by Bill Prince required severance because Bill's statement incriminated Don Prince.

While in prison, Bill sent a letter to his wife, which contains the following passage:

> Please keep me posted on Pam [Don's daughter] and Scott's kids. I sure hope Jillian will be well soon. I know they are really hurt with everything that is going on. But I hope they will understand that everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. But if it would be any consolation, I would have done the same for Don.
> (Emphasis added).

The district court ruled that this letter was admissible against Bill, but inadmissible against Don. Don Prince argued that if this letter was to be admitted against Bill, his case should be severed from Bill's. The district court admitted the letter but refused to sever. Don argued that the emphasized sentence in the letter facially and powerfully incriminates him. For this reason, he asserted that its admission at the joint trial violates the rule established in Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

In Bruton, the Supreme Court held that admission at a defendant's trial of the confession of a non-testifying co-defendant, which is "powerfully incriminating" of the defendant, violates the defendant's Sixth Amendment right to confront adverse witnesses. Id. at 135. "A cautionary instruction by the trial court cannot cure such a violation and if such evidence is to be admitted against the co-defendant, severance of the defendants' trials is necessary." Id.

The court of appeals acknowledged that the letter named Don, but found,

> Bruton does not mandate severance unless evidence 'powerfully incriminates' a defendant. In Bruton, the co-defendant directly inculpated the petitioner by stating essentially that "we committed the crime." Here, on the other hand, the challenged passage does not powerfully incriminate Don. To be sure, in light of the evidence presented in this case, a juror could conclude that "the same" Bill would have done for Don referred to the crime charged against Don--conspiring to murder the witnesses against his brother.

Thus, the court of appeals acknowledged that the jury would naturally have concluded that the reference "I would have done the same for Don," constituted an admission by Bill of Don's guilt. Nevertheless, the court of appeals then speculated that the jury might also have interpreted "the same," to refer to Don's assistance to Bill while he was in prison. The court of appeals supposes that "the same" Bill would have done could be interpreted to refer to the fact that Don extensively assisted his brother by running his business, visiting him in jail, and attempting to obtain affidavits. However, the context of the statement clearly shows otherwise.

This statement was made after Don had been arrested and charged with murder for hire. When Bill referenced the "hurt" to Don's family and the unforgivable "problems," that "the same" had caused, he was clearly not talking about the inconvenience Don had

been put to. Bill was clearly not stating that he would "never forgive" himself for inconveniencing his brother. Instead, the most direct and obvious interpretation of Bill's "the same" is that he was referring to murder for hire. Bill was stating that he would have participated in a murder for hire scheme in order to help Don if the roles were reversed. This is the obvious interpretation and it is the only interpretation that makes sense. There is no reason to think that this is not the interpretation that impressed the jury. This statement was therefore powerfully incriminating to Don Prince.

In addition, the barely conceivable, less damaging, interpretation posited by the court of appeals was not presented to the jury. Only Bill could explain what he meant or give an alternate interpretation and Bill was not available for cross-examination. That is the point. Don Prince was not able to put an alternate interpretation of the statement before the jury because he was not able to cross-examine its author. The inability to cross-examine is the problem in Bruton situations. The remedy is severance. "The vice of using a post-conspiracy statement that implicates another defendant lies in the denial of Sixth Amendment rights of confrontation and cross-examination when the author does not testify. Then severance is imperative." United States v. Harris, 409 F.2d 77, 81(4th Cir. 1969).

Severance was imperative here. After the fact, it is apparently possible to think of other innocuous interpretations which could conceivably have been given to Bill's statement. However, there is every reason to believe that the jury gave the statement its obvious meaning. Petitioner could not elicit an innocuous explanation from Bill because Bill did not testify. Petitioner further could not attack the accuracy or veracity of the speaker because, again, Bill was the declarant and Bill did not testify. Petitioner was powerfully incriminated by a hearsay statement and was unable to cross-examine the declarant. This is reversible error.

In Bruton, the Supreme Court held that because of the substantial risk that the jury, despite instructions to the contrary, may look to the incriminating extrajudicial statements in determining guilt of those other than the declarant, admission of

such statements in a joint trial violates the right of cross-examination secured by the confrontation clause of the Sixth Amendment. 391 U.S. 123,126, 88 S.Ct. 1620, 20 L.Ed.2d 476.

The statement made by Bill Prince falls squarely within the prohibition of Bruton. The statement directly links Don Prince to the murder for hire scheme and is highly incriminating. Bill Prince did not testify and could not be questioned as to this statement. Admitting the statement against Bill in Don's trial was prejudicial error and requires a reversal of the conviction of Don Prince.

CONCLUSION

The jury in this case at least considered acquitting Don Prince but was erroneously not allowed to return such a verdict. The jury's inclination to acquit Don Prince highlights the weakness of the Government's case against Don and absolutely vitiates any finding that the evidence against Don was voluminous or overwhelming. Under these circumstances, the court of appeals erred in finding that the numerous evidentiary errors committed by the district court were harmless.

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

November 12, 1999

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APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DON PRINCE,
Defendant-Appellant.

No. 97-4329

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROGER DEWITT PRINCE, a/k/a Bill Prince, a/k/a Ike Davis,
Defendant-Appellant.

No. 97-4334

Appeals from the United States District Court
for the District of South Carolina, at Columbia.
Joseph F. Anderson Jr., District Judge.
(CR-96-122)

Argued: June 8, 1999

Decided: July 20, 1999

Before MURNAGHAN, LUTTIG, and MOTZ,
Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Jack Bruce Swerling, Columbia, South Carolina, for Appellants. John Michael Barton, Assistant United States Attorney, Columbia, South Carolina, for Appellee. **ON BRIEF:** Jack W. Lawson, Florence, South Carolina, for Appellant Roger Prince. J. Rene Josey, United States Attorney, Scarlett Wilson, Assistant United States Attorney, Columbia, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

A jury convicted two brothers, Don Prince and Roger Dewitt ("Bill") Prince, of conspiring in a murder-for-hire scheme directed at killing two persons expected to testify against Bill in connection with an earlier contract murder. Both brothers appeal, asserting that numerous errors require reversal of their convictions and sentences. Finding no reversible error, we affirm.

I.

In 1992, a South Carolina state court tried and convicted Bill Prince, along with Charlie Dorn Smith, of conspiracy and solicitation of the murder of Bill's foster father, Billy Graham. Evidence at that trial showed that Prince and Smith hired a man to kill Graham to eliminate their $259,000 debt to him and to collect on a $500,000 life insurance policy on Graham. Frederick "Peaches" Andrews testified as to Prince and Smith's involvement in Graham's murder.

Prince and Smith appealed their convictions; Prince remained free on bond during the appeal period. The South Carolina Supreme Court reversed Smith's conviction, but affirmed Prince's. Shortly thereafter,

Prince learned he had cancer. He petitioned for rehearing, but the court denied that petition on August 26, 1994. Rather than turning himself in the Monday after the petition for rehearing was denied, Bill Prince left town and remained a fugitive until his capture almost a year later.

Don Prince, Bill's brother, helped Bill evade law enforcement during the year that Bill was a fugitive. Don brought Bill, who was very ill, back to the United States from Puerto Rico, visited Bill, kept in telephone contact with Bill, ran Bill's businesses for him, arranged doctor's appointments for Bill, and found places for Bill to live. When Don's ex-girlfriend learned of Don and Bill's scheme to keep Bill out of jail, Don threatened her to keep her quiet. Don worked with Bill's lawyers on new trial motions and post conviction relief; he attempted to obtain sworn affidavits to assist in these efforts. Don testified at trial, admitting that he assisted Bill in these ways while Bill was a fugitive but explaining that he did so because he loved his brother and wanted to help him during his sickness. Don also testified that he frequently urged Bill to turn himself in.

After state authorities arrested Bill in August 1995, Don, who lived and worked in North Carolina, frequently visited Bill in prison in South Carolina. Don continued managing Bill's affairs and continued to attempt to acquire affidavits in an effort to obtain a new trial for Bill. Don testified to talking to T. Cross, who told Don that he could obtain an affidavit from Peaches Andrews recanting his testimony in the Billy Graham trial. Don had an affidavit prepared and gave it to T. Cross, but Andrews never signed the affidavit. Don also testified to his attempts to obtain an affidavit from Charlie Dorn Smith, who had given an affidavit in 1991 that was helpful to Bill; Don believed that Smith would sign another more detailed affidavit. Don visited Smith and had one of the attorneys and others talk to Smith; Smith, however, did not sign the affidavit. In addition, Don obtained statements from some twenty other witnesses. Various attorneys confirmed that they worked with Don to obtain the affidavits to provide grounds to obtain a new trial for Bill.

In late summer while imprisoned, Bill told Don that he had a friend, a former fellow inmate in state prison, Scott Sherpinskas, who could get the Andrews and Smith affidavits signed. Actually, Sherpin-

skas was an FBI informant. After talking with Bill, Sherpinskas contacted Special Agent Rob Waizenhofer telling him that Bill and Don Prince wanted to hire someone to kill Peaches Andrews and Charlie Dorn Smith. According to Sherpinskas, he and Bill Prince began discussing the contract murders of Andrews and Smith in October 1995. Bill wanted to murder Smith because he believed that Smith had orchestrated the lawsuit that Bill's son, Dewitt, had recently filed to obtain control of his father's business. Bill presumably wanted to kill Andrews because of his testimony in Bill's first trial and his subsequent unwillingness to recant. Bill came up with the idea of having Andrews killed, with Dewitt and Smith's murders to follow. After more thought, Bill decided not to kill Dewitt but to have him framed for possessing heroin in hopes of distracting him from pursuing the lawsuit. Bill assured Sherpinskas that his brother Don would travel from North Carolina to pay Sherpinskas's hit man in South Carolina. Bill also told Sherpinskas that his brother Don was going to find someone else to commit the murders if Sherpinskas could not find someone to do it.

As proof of the Princes' murder-for-hire plot, the Government presented another witness, George Thomas Young, who was imprisoned with Bill Prince during the Fall of 1995. (Young did not know of the plot with Sherpinskas and Sherpinskas did not know of the plot with Young.) Young testified that Bill asked him to arrange to murder Andrews and Smith after Young got out of jail on December 1, 1995, in exchange for a pay-off from Don. Bill gave Young maps to Smith's girlfriend's house as well as to Andrews' house and explained that Don would help Young find the houses and would pay Young for the murders. Don acknowledged that Bill introduced him to Young as a "friend," while Young was still imprisoned, but Don disclaimed all knowledge of the two murder plots.

Upon Young's release from prison, Don, after traveling from North to South Carolina, met with Young and showed him the residences of Smith's girlfriend and of Andrews. Don paid Young approximately $2,000 and gave him telephone charge cards to use for calling Don. Don admitted giving the money and telephone cards to Young at his brother's request, explaining that his brother Bill was extremely generous and often told him to distribute or send money to inmate friends. Using the charge cards, Young frequently contacted Don dur-

ing Young's first week of release, and Don telephoned Young on at least one occasion. According to Young, he also met with Don to discuss the murder plots on December 7. Young's wife and a neighbor corroborated the fact that Young met with Don and that Young had a map of Smith's girlfriend's house. The evidence showed that Young accurately described the homes of Peaches Andrews and Smith's girlfriend.

On December 8, 1995, Sherpinskas pretended that he had arranged to have a hit man murder Andrews and showed Bill a staged photograph depicting the dead body of Peaches Andrews. Bill negotiated with Sherpinskas as to the amount owing for Andrews's murder and the down payment for Smith's murder. Bill assured Sherpinskas that Don would make the payments to Sherpinskas's chosen hit man. Bill and Sherpinskas came up with the code word "Turbeville" for Don to use so that the hit man would know and recognize Don.

When Don arrived at the prearranged location, a rest stop area off Interstate 20, he asked the hit man (actually undercover FBI Agent Bruce Otterbacher who taped their conversation), "You don't know how to get to Turbeville, do you?" Don and Otterbacher discussed the payoff and Don told him to get rid of the envelopes that contained the $5,000 payoff. Otterbacher asked Don if he had seen the newspaper story reporting the disappearance of Peaches Andrews and Don told him that he had been called earlier that morning about the article. Otterbacher talked about the "first deal" and the "second one." Don told the agent "he wants you to hold off on the second one." The agent replied, "he doesn't want me to do Smith?" Don answered, "no, he wants you to hold on it . . . he wants everything on hold" because "things are buzzing about this." There was a mix-up regarding the payments and the agent asked Don when he could talk to his brother Bill and clear the matter up. Don demurred, explaining, "I don't like to talk a lot to him on the telephone because when he was on the run all my lines were bugged . . . and they still may be."

After Don paid the agent, law enforcement officers arrested him. The police reported that Don then stated in a disgusted voice, "The things you would do for your brother." In the weeks after Don's arrests, the Government obtained search warrants for Don's office,

home, boat, and car. The Government introduced at trial several incriminating letters and documents obtained from those searches.

The brothers (mostly Don) lodge numerous arguments as to why their convictions must be reversed.

II.

Both brothers initially object to the district court's refusal to redact a tape recording and transcript of a conversation between Bill and a Government informant in order to omit Bill's use of the word "niggers." They rightly note that this pejorative word had no probative value and was likely to be prejudicial to them.

The Government suggests that the district court offered to allow the defense to use its own version of the transcript, which lacked the epithet. But in fact, the court offered only to allow the admission of the defendant's transcript *in addition to* the transcript prepared by the Government, which did contain the epithet. As the district court observed, this approach would almost certainly have had the effect of making the epithet more conspicuous, and thus the brothers' refusal to agree to it cannot be considered a rejection of a solution to the problem.

The Government also suggests that redaction is unnecessary in this case because the epithet was isolated, redaction would have delayed the trial, and the defense had failed to seek redaction before trial even though it had access to the tape for several weeks. The primary reason the defense failed to request redaction earlier, however, appears to be that its transcript of the tape never included the word. Although at trial the Government asserted that redaction would take "all afternoon," that statement seems to have been based primarily on its concern that new transcripts would have to be made, and the district court indicated that new transcripts could be made quickly and easily. Accordingly, we find the Government's argument that the epithet was properly admitted because redaction would have caused unjustifiable delay unpersuasive.

However, we believe that the error in failing to redact the statement was harmless because of the district court's careful jury instruction.

"We generally presume that a jury will follow cautionary instructions regarding potentially prejudicial evidence." *United States v. Love*, 134 F.3d 595, 603 (4th Cir. 1998). The district court instructed the jury not to allow the offensive language in the tape influence its conclusions. This instruction was sufficient to eliminate the relatively modest prejudicial effect that this isolated epithet might otherwise have had on the jury.

III.

While in prison, Bill sent a letter to his wife, which contains the following passage:

> Please keep me posted on Pam [Don's daughter] and Scott's kids. I sure hope Jillian will be well soon. I know they are really hurt with everything that is going on. But I hope they will understand that everything is my fault. I will never be able to forgive myself for the problems that I have caused everybody. *But if it would be any consolation, I would have done the same for Don.*

(Emphasis added). The district court concluded that this letter constituted proper admissible evidence against Bill, but not against Don. Neither of those rulings is challenged on appeal.

What Don does challenge is the district court's refusal to sever his trial from Bill's. Don contends that the emphasized sentence in the letter facially and powerfully incriminates him. For this reason, he asserts that its admission at their joint trial violates the rule established in *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, the Supreme Court held that admission at a defendant's trial of the confession of a non-testifying co-defendant, which is "powerfully incriminating" of the defendant, violates the defendant's Sixth Amendment right to confront adverse witnesses. *Id.* at 135. A cautionary instruction by the trial court cannot cure such a violation and if such evidence is to be admitted against the co-defendant, severance of the defendants' trials is necessary. *Id.*

Subsequently, in *Richardson v. Marsh*, 481 U.S. 200 (1987), however, the Court clarified that a jury instruction can prevent or cure a

Sixth Amendment violation where the proffered statement does not expressly implicate the defendant, but only becomes incriminating by virtue of an inference from other evidence. The Court explained:

> Where the necessity of such linkage is involved, it is a less valid generalization that the jury will not likely obey the instruction to disregard the evidence. Specific testimony that "the defendant helped me commit the crime" is more vivid than inferential incrimination, and hence more difficult to thrust out of mind. Moreover, with regard to such an explicit statement the only issue is, plain and simply, whether the jury can possibly be expected to forget it in assessing the defendant's guilt; whereas with regard to inferential incrimination the judge's instruction may well be successful in dissuading the jury from entering onto the path of inference in the first place, so that there is no incrimination to forget.

Id. at 208.

The *Richardson* Court emphasized that the statement at issue there omitted all reference to the existence of the defendant; of course, here, the challenged statement does expressly name Don. Moreover, the *Richardson* Court rationalized its distinction between "facially incriminating" statements and statements "requiring linkage" by noting that a rule limiting the application of *Bruton* to the former could be "complied with by redaction — a possibility suggested in that opinion itself." *Id.* at 208-09. Here, redaction of the last sentence would have entirely remedied the problem; however, neither the parties nor the district judge considered redaction. They only discussed exclusion of the entire letter, severing Don's trial from Bill's, or admission of the letter with an instruction that the jury was only to consider it as evidence against Bill. (Don rejected the instruction.)

Thus, the case at hand differs from *Richardson*. However, Don cannot prevail based on these distinctions because *Bruton* does not mandate severance unless evidence "powerfully incriminates" a defendant. In *Bruton*, the co-defendant directly inculpated the petitioner by stating essentially that "we committed the crime." Here, on the other hand, the challenged passage does not powerfully incriminate Don.

To be sure, in light of the evidence presented in this case, a juror could conclude that "the same" Bill would have done for Don referred to the crime charged against Don — conspiring to murder the witnesses against his brother. Even if all evidence of Don's aid to Bill while Bill was a fugitive was excluded, *see infra* at 11-12, the Government presented abundant evidence that while Bill was imprisoned, Don visited and telephoned Bill frequently, ran his businesses, and worked feverishly to obtain the affidavits believed necessary for Bill's new trial. Indeed, Don testified at trial and freely admitted to the considerable efforts he made on his brother's behalf.

If Don was, as he claimed, not guilty of the crime charged, Bill might well have especially regretted and so particularly apologized to the family for the fact that Don's innocent assistance to him could be used as circumstantial evidence tying Don to Bill's criminal conspiracy. The statement in Bill's letter is not in any way inconsistent with Don's defense that he extensively assisted his brother but never participated in any murder-for-hire plot. The statement, standing alone, simply does not powerfully incriminate Don.

IV.

Don also challenges the search warrants used by the Government to search his car, home, boat, and office. He contends that the warrants were supported by false information, were not based on probable cause, and were overbroad.

We have carefully examined the affidavits and warrants. We have no difficulty concluding that the affidavits contained no information known by the officers to be materially false. Similarly, those affidavits provide ample probable cause to justify issuance of the warrants.

Some portions of the warrants do, however, contain broad boilerplate language authorizing seizure of every conceivable item without tying these items to the alleged crimes or circumstances of the case. However, the first two categories of "items to be seized" listed in the warrant are specifically identified, *i.e.* "life insurance policies, business transactions, and/or communications involving" Bill, Don, and their allegedly intended victims, and documents "evidencing the fraudulent or illegal acquisition of life insurance policies or the pro-

ceeds thereof." These two categories are certainly described with adequate particularity. *See United States v. Fawole*, 785 F.2d 1141, 1144 (4th Cir. 1986).

We have held that, in order to avoid the suppression of lawfully seized evidence, a warrant that properly identifies some items "will not be defeated by [other] ambiguous or conclusionary language" so long as the warrant was "sufficiently particularized with respect to the items seized." *United States v. Jacob*, 657 F.2d 49, 52 (4th Cir. 1981). In other words a court will "sever" the too general portion of the warrant from the sufficiently specific portion. *See United States v. George*, 975 F.2d 72, 79 (2d Cir. 1992). A search "conducted pursuant to a warrant held unconstitutional in part does not invalidate the entire search [and] only those items seized beyond the warrant's scope will be suppressed." *Id.* ("'the remedy with respect to any items exceeding the scope of the warrant [is not] invalidation of the search but suppression of those items.'") (quoting *United States v. Dunaloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978)).

Don has pointed to no evidence used by the Government at trial that did not fall into the properly identified first two categories of the warrant. The evidence obtained pursuant to the lawful portion of the warrant was rightly admitted, the remainder of the warrant, while too broad, provides no basis for reversal.

V.

Don maintains that the district court erred in admitting, over his objection, evidence of Bill's prior murder conviction; evidence that Bill was a beneficiary of the insurance policies held by the victim of that murder, Billy Graham, and by one of the intended victims of the instant murder-for-hire scheme; evidence that Don helped Bill collect on Graham's policy; evidence that Don helped Bill when he was a fugitive; evidence, including the complaint, of a lawsuit brought against Don by his nephew; and evidence of threats allegedly made by Don against a woman who later testified at trial for the Government. Don asserts that the admission of this evidence violated Federal Rule of Evidence 404(b), in that it simply constituted evidence of bad character with no other legitimate evidentiary purpose, and Rule 403, in that its prejudicial effect outweighed its probative value.

Rule 404(b) permits admission of evidence necessary to prove "motive, opportunity, preparation, plan, knowledge, identity or absence of mistake or accident." *United States v. Bailey*, 990 F.2d 119, 122 (4th Cir. 1993). Also admissible is evidence of bad acts that arise out of the same series of transactions as the charged offense and is "necessary to complete the story of the crime," *United States v. Kennedy*, 32 F.3d 876, 885 (4th Cir. 1994), evidence inextricably intertwined with the charged crime, *United States v. Chin*, 83 F.3d 83, 88 (4th Cir. 1996), or evidence "elicited as part of the groundwork that the government needed to lay to explain to the jury how . . . individuals fit into the operation of [a] conspiracy," *United States v. McMillon*, 14 F.3d 948, 955 (4th Cir. 1994). It is well established that evidence of these kinds does not implicate Rule 404(b)'s prohibition of evidence admitted solely to demonstrate bad character. *See Kennedy*, 32 F.3d at 886; *Chin*, 83 F.3d at 88; *McMillon*, 14 F.3d at 955.

We fail to see what bearing Bill's murder conviction and his status as a beneficiary of the insurance policies would have on the matter of Don's character, and thus we doubt that this evidence even raises a question under Rule 404(b). The evidence concerning Bill and the insurance policies certainly has no such significance in itself. Assuming that Bill's prior murder conviction could have subjected Don to inferences of guilt or bad character by association, that evidence was plainly admissible as evidence necessary to complete the story of the crime. *See Kennedy*, 32 F.3d at 885. Similarly, the evidence concerning the lawsuit was properly admitted to illustrate Don's motive and intent to kill Smith. Likewise, Don's threatening statements to his ex-girlfriend was evidence of his intent, preparation, plan, and absence of any mistake. Nor did any of this evidence unfairly prejudice Don.

The evidence that Don helped Bill collect on the Graham policy and that Don helped Bill while he was a fugitive, by contrast, should have been excluded. This evidence could have been omitted without adversely affecting a complete presentation of the story of the crime alleged against Don, *i.e.*, conspiracy to murder the witnesses. The assistance Don gave Bill when he was a fugitive manifestly was not part of the same criminal episode as the conspiracy to murder the witnesses; the "criminal episode" surrounding Bill's flight from justice terminated when Bill was captured, and there is nothing to indicate

that Bill planned to murder the witnesses before then. Thus, evidence of Don's assistance to Bill while he was a fugitive was not admissible as evidence of acts constituting "necessary preliminaries" to the conspiracy, acts "inextricably intertwined" with it, acts forming part of a single criminal episode containing the alleged crime, *Chin*, 83 F.3d at 88, or acts arising out of the same series of transactions, *Kennedy*, 32 F.3d at 885.

It is difficult to see what probative value this evidence could have had other than to suggest that Don had previously been involved in Bill's unlawful activity, and that Don was therefore likely to have conspired with his brother in the charged conspiracy. The only justifications that the Government offers for this evidence are that it "allowed the jury to fully understand the extent of the conspiracy and the illegal methods used by him and Bill in reaching the goal of their conspiracy," and that it "shows how the Prince brothers established a relationship of trust through their activities and how these events flowered into the charged crimes." Brief of Appellant at 33. The former assertion falsely implies that the prior bad acts were part of the conspiracy alleged, and the latter in effect creates a new exception to Rule 404(b) that would allow a defendant's prior bad acts in conjunction with a co-defendant, whatever their nature, to be admitted in virtually every instance.

In sum, even if this evidence could survive scrutiny under Rule 404(b), it would nonetheless be inadmissible under Rule 403 because its prejudicial effect would outweigh whatever modest probative value it might have. However, even where the trial court abuses its discretion in admitting bad character evidence, such error may be harmless. *See United States v. Kenny*, 973 F.2d 339, 344 (4th Cir. 1992). In deciding the harmlessness of an error we must determine "whether we can say that we believe that it is 'highly probable that the error did not affect the judgment.'" *United States v. Madden*, 38 F.3d 747, 753 (4th Cir. 1994) (quoting *United States v. Nyman*, 649 F.2d 208, 212 (4th Cir. 1980)). In light of the voluminous properly admitted evidence detailed above against Don, we have no difficulty finding that the error here did not affect the judgment and was therefore harmless.

VI.

Don asserts that the district court erred by instructing the jury that "[i]t does not matter whether the interstate travel took place before or after the murder occurred or was supposed to have occurred," because the statute criminalizes interstate travel with an intent that murder "be committed," not interstate travel following a murder.

Don maintains that the meeting in which he gave money to the Government agent occurred after the victim to whom the payment allegedly related, Peaches Andrews, was already believed to be dead. Even if the Government cannot rely on evidence of travel post-murder, a question we need not decide here, this does not assist Don in light of the fact that the Government produced evidence tending to show that Don traveled interstate to further the plan to murder Andrews *before* he came to believe Andrews was dead. The evidence indicated, for example, that Don could not have believed Andrews was dead prior to December 8, and that Don drove from North to South Carolina on December 1 to meet with an individual concerning Andrews's murder.

VII.

We have carefully reviewed Don's other arguments as to why his conviction must be reversed and find them all meritless. There remains only Don's assertion that the district court improperly enhanced his sentence for obstruction of justice under U.S.S.G. § 3C1.1.

On appeal, Don essentially contends that there was insufficient evidence for the district court to find that he gave false testimony when he took the stand. The district judge made a finding at the sentencing hearing that Don had lied at trial when he testified that the money he gave to the hit man was paid for the purpose of obtaining affidavits to help secure a new trial for Bill. The district court relied heavily on the audio tape of the meeting at the interstate rest area between Don and Agent Otterbacher. Though the court noted that "the parties [on the tape] used guarded language and code words," it also noted that "[i]t was obvious they were talking about something that was somewhat nefarious" and that there was no reference on the tape to any sort

of affidavit. Indeed, the tape contains interchanges between Don and the undercover agent that seem surely related to the plot to murder Peaches Andrews and Smith, not to affidavits. For instance, when Otterbacher complained about the amount of money Don had brought, the following exchange took place:

> Otterbacher: I was supposed to get five thousand for the first deal, okay. That was up front and I was supposed to get five thousand more cut in half and you guys were gonna hold on to half of it for the second one.
>
> Don: Yeah, but [Bill] wants you to hold off on the second one.
>
> Otterbacher: Oh, he doesn't want me to do Smith?
>
> Don: No, no, no, no, no he [Bill] wants to hold on it.
>
> Otterbacher: I thought he wanted him done in a couple days.
>
> Don: No, no, no, no, he wants you to hold him. He wants you to hold on him . . . .

The discussion on the tape in conjunction with the trial testimony of Sherpinskas, who arranged the meeting, convince us that the district court did not commit clear error when it found that Don had lied on the stand about this meeting. Thus there was sufficient evidence to support the district court's obstruction of justice enhancement.

In his reply brief, Don additionally contends that the sentencing judge failed to follow the requirements of *United States v. Dunnigan*, 507 U.S. 87 (1993). *Dunnigan* directs that in order to impose an enhancement for obstruction of justice, a court must make a "finding . . . of an obstruction of, or impediment to, justice that encompasses all of the factual predicates for a finding of perjury." *Id.* at 95. The "factual predicates" consist of at least the main elements of the Court's definition of perjury: falsity, materiality, and intent. *See id.* at 94. Don contends that in this case the district court found only that Don committed "perjury," and made no specific findings on two of the factual predicates, namely intent to testify falsely and materiality.

Whether the district court's finding was sufficient under *Dunnigan* presents a close question. However, this circuit has long held that we will not address new arguments raised for the first time in the reply brief. *See Hunt v. Nuth*, 57 F.3d 1327, 1338 (4th Cir. 1995). Don has thus waived his *Dunnigan* argument; the obstruction of justice enhancement was not otherwise in error.

AFFIRMED